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Supreme Court of the United States

OCTOBER TERM, 1954

No. 231

ESTATE OF WILLIAM SCADRON, Deceased,
DOROTHY SCADRON, Administratrix,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT TO REVIEW AN ORDER AFFIRMING A DECISION AND ORDER OF THE TAX COURT OF THE UNITED STATES DETERMINING THAT THERE IS DUE FROM THE PETITIONER FIFTY (50%) PER CENT PENALTIES UNDER TITLE 26 U. S. C. SECTION 293(b) IN THE AMOUNTS OF TWO THOUSAND ONE HUNDRED THIRTY-THREE AND 51/100 ($2,133.51) DOLLARS AND TWENTY-THREE THOUSAND SEVEN HUNDRED SEVENTY-FOUR AND 56/100 ($23,774.56) DOLLARS FOR THE TAXABLE YEARS ENDED APRIL 30, 1944 AND APRIL 30, 1945

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INDEX

	PAGE
PETITION FOR WRIT OF CERTIORARI	
OPINIONS DELIVERED IN COURTS BELOW	2
JURISDICTIONAL STATEMENT	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR ALLOWING WRIT OF CERTIORARI	5
APPENDIX	13

TABLE OF CASES

Bartlett v. *Kane*, 16 How. 263	8
Briden, Estate of, v. *Commissioner*, 11 T. C., 1095, affirmed sub. nom. Kirk v. Commissioner, 179 F. (2d) 619	4, 6, 9, 10, 11
Helvering v. *Mitchell*, 303 U. S. 391	5, 9
Helwig v. *U. S.*, 188 U. S. 605	8
Howell, Myrna S., v. *Commissioner*, 10 T. C. 859, affirmed 175 F. (2d) 240	8
Iron Bank v. *Brady*, 184 U. S. 665	10
Labor Board v. *Jones & Laughlin*, 301 U. S. 1, 48	11
Manassa Karger (*Estate of Marks Karger*) v. *Commissioner*, 38 B. T. A. 209	8
Moore v. *Backus*, 78 F. (2d) 571	10
National City Bank of New York, Executor (*Estate of James E. O'Neil*) v. *Commissioner*, 35 B. T. A. 975, affirmed 98 F. (2d) 93	8

PAGE

National City Bank of New York, Executor (Estate of Robert Jill) v. *Commissioner*, 21 B. T. A. 1080 8

Oceanic Steam Navigation Co. v. *Stranahan*, 214 U. S. 320 9

Passarant v. *United States*, 148 U. S. 424 8

Patton v. *Brady*, 184 U. S. 608 10

Reimer, Estate of Charles L. v. *Commissioner*, 12 T. C. 913, affirmed 180 F. (2) 159 ..... 5, 6, 10, 11

Schreiber v. *Sharpless*, 110 U. S 76, 80 10

Sullivan v. *Associated Billposters and Distributors*, 6 F. (2d) 1000 10

U. S. v. *Daniels*, 6 How. 11, 12 10

STATUTES AND AUTHORITIES

Act of June 30, 1864, 13 Stat. 223, 226 6

Act of October 3, 1913, 38 Stat. 114, 179 7

65 Congressional Record, 2429 7

G. C. M. 9162 (X-1 C. B. 263 (1931)) 7

G. C. M. 15736 (XIV-2 C. B. 325 (1935)) 7

House of Representatives Conference, Manager's Report, p. 61 (Revenue Act of 1918) 7

Law Opinions, 926 (I. C. B. 241 (1919)) 7

Law Opinions, 1091 (I-1 C. B. 422 (1922)) 7

17 Op. Att. Gen., 433, 435 7

23 Op. Att. Gen., 398 7

Revenue Act of 1918, Sec. 250(b) 7

PAGE

Revenue Act of 1924, Sec. 275(b) 7

Senate Finance Committee Report No. 617, Sixty-Fifth Congress, Third Session 7

Senate Hearings, H. R. 6715, 68th Congress 7

United States Code:

Title 26, Section 272 4

Title 26, Section 293(b); 53 Stat. 88 ..... 2, 3, 4, 5, 6

Title 26, Section 1141 2

Title 28, Section 1254 2

United States Constitution, Amendment VII 11

Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

ESTATE OF WILLIAM SCADRON, Deceased,
DOROTHY SCADRON, Administratrix,
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v.

COMMISSIONER OF INTERNAL REVENUE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT TO REVIEW AN ORDER AFFIRMING A DECISION AND ORDER OF THE TAX COURT OF THE UNITED STATES DETERMINING THAT THERE IS DUE FROM THE PETITIONER FIFTY (50%) PER CENT PENALTIES UNDER TITLE 26 U. S. C. SECTION 293(b) IN THE AMOUNTS OF TWO THOUSAND ONE HUNDRED THIRTY-THREE AND 51/100 ($2,133.51) DOLLARS AND TWENTY-THREE THOUSAND SEVEN HUNDRED SEVENTY-FOUR AND 56/100 ($23,774.56) DOLLARS FOR THE TAXABLE YEARS ENDED APRIL 30, 1944 AND APRIL 30, 1945

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of

Appeals for the Second Circuit, entered in this cause on April 27, 1954, affirming a decision and order of the Tax Court of the United States, entered on June 29, 1953.

Opinions Delivered in Courts Below

The Tax Court of the United States rendered a Memorandum Findings of Fact and Opinion in this case on April 17, 1953, Tax Court Docket No. 34530 (not officially reported) and an order, based thereon, was entered in the Tax Court of the United States on June 29, 1953. The United States Court of Appeals for the Second Circuit affirmed the order of the Tax Court per curiam on April 27, 1954, No. 219—October Term, 1953, Docket No. 22949 (212 F. 2d 188). The Memorandum Findings of Fact and Opinion of the Tax Court and its order appear on pages 68 through 76 of the transcript of record in the United States Court of Appeals for the Second Circuit, copies of which are being filed herewith. The decision and order of the United States Court of Appeals for the Second Circuit appear in the appendix hereof.

Jurisdiction

The order of the United States Court of Appeals for the Second Circuit affirming the order of the Tax Court of the United States is dated and was entered on April 27, 1954. Jurisdiction of this Court is invoked under the provisions of Title 28 U. S. C., Section 1254 and Title 26 U. S. C., Section 1141.

Questions Presented

The questions involved are:

1. The nature of the statutory addition to income tax deficiencies imposed by Title 26 U. S. C., Section 293(b); 53 Stat. 88.

2. Whether such statutory addition survives the death of the taxpayer in this case.

Statutes Involved

Title 26 U. S. C., Section 293, 53 Stat. 88—Additions to the tax in case of deficiency:

> "(b) Fraud. If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in Section 3612(d)(2)."

Statement of the Case

Petitioner is the administratrix of the Estate of William Scadron, deceased. The said deceased filed his income tax returns for the fiscal years ended April 30, 1944 and April 30, 1945 with the Collector of the Third District of New York on the cash receipts and disbursements method. The taxpayer, William Scadron, died on June 27, 1946 and after his death the Bureau of Internal Revenue commenced an investigation of his tax returns for the above stated fiscal years.

The Bureau's investigation developed a substantial increase in the taxpayer's net worth for the years in question and on this basis made a determination that there were deficiencies in income tax for each such year and that such deficiencies were due to the taxpayer's fraud with the intent to evade taxes.

The Bureau therefore asserted deficiencies against the estate of the taxpayer and in addition thereto penalties of 50 per centum of such deficiencies, as provided for by Title 26 U. S. C., Section 293(b).

The petitioner, as administratrix of the taxpayer's estate, protested the assertion of the 50 per centum penalties and filed her petition in the Tax Court of the United States for a redetermination of such penalties pursuant to the provisions of Title 26, U. S. C. Section 272.

The Tax Court of the United States rendered a Memorandum Findings of Facts and Opinion, Tax Court Docket No. 34530 (not officially reported) on April 17, 1953, in which it found that the deceased taxpayer had failed to report income received by him and that such failure was due to fraud with intent to evade tax for the fiscal years ending April 30, 1944 and April 30, 1945 and entered a decision and order on June 29, 1953 that there was due from the petitioner 50 per centum penalties in the amounts of $2,133.51 and $23,774.56 for the taxable years ended April 30, 1944 and April 30, 1945 respectively.

The petitioner filed a petition in the United States Court of Appeals for the Second Circuit to review the decision and order of the Tax Court of the United States on the following grounds:

1. That the Commissioner of Internal Revenue had failed to sustain the burden of proof with respect to the fraudulent intent of the taxpayer to evade tax.

2. That the 50 per centum fraud penalty, provided for by Title 26 U. S. C., Section 293(b) did not survive the death of the taxpayer, abated upon his death and could not be asserted against his estate.

The United States Court of Appeals for the Second Circuit affirmed the decision of the Tax Court of the United States on April 27, 1954 in a per curiam opinion, reported in 212 F. (2d) 188 in which it held that the filing of fraudulent returns was amply proved, and affirmed the decision of the Tax Court as to the nature of the 50 per centum addition to the tax deficiency for fraud and its survivability on the authority of *Kirk* v. *Commissioner*, 1 Cir., 179 F.

(2d) 619 and *Reimer's Estate* v. *Commissioner,* 6 Cir., 180 F. (2d) 159. However, the Court of Appeals concluded its opinion with the following:

> "* * * We agree though, if we thought the question res integra, we might reach a different conclusion."

In this application petitioner does not raise the question of the burden of proof argued in the Court of Appeals, but limits herself to the main questions asserted above and subsidiary questions fairly comprised therein.

Reasons for Allowing Writ of Certiorari

1. The Court of Appeals in this case has construed a federal statute which has not been previously construed by this Court in so far as the question involved herein is concerned and has decided an important question of federal law which has not been, but should be settled by this Court.

This Court has never decided whether the 50 per centum addition to tax deficiency provided for by Title 26 United States Code, Section 293(b) survives the death of the taxpayer, nor has this Court in any recorded case squarely presenting this question decided that the nature of the liability so imposed was such that it did survive. The main case relied upon by the respondent and Court of Appeals, *Helvering* v. *Mitchell,* 303 U. S. 391, 58 S. Ct. 630, 82 L. Ed. 917, does not so hold as will be subsequently demonstrated, but on the contrary indicates a liability that characteristically abates upon a taxpayer's death.

It is of the utmost public importance in the administration of the tax laws and of the gravest importance in the administration of the estates of deceased persons that this Court determine the precise nature of this liability and whether or not it survives the death of the taxpayer and is a claim against his estate. Such a determination is of primary concern to the personal representatives and the dis-

tributees of such estates, especially since there is no statute of limitation applicable to the assertion of such liability based upon the fraud of the taxpayer while he was alive and such claim can be asserted long after his death.

2. The decision of the Court of Appeals in this case in affirming the decision of the Tax Court on the authority of *Kirk* v. *Commissioner,* supra and *Reimer's Estate* v. *Commissioner,* supra, casts serious doubt upon the validity of the decisions in those cases and upon the legal principles therein enumerated when it says in its per curiam opinion:

> "• • • We agree though, if we thought the question res integra, we might reach a different conclusion."

This equivocal assent to the only other cases in the Court of Appeals establishing new legal principles of doubtful validity is a forceful and vital reason for the determination and settlement of those principles by this Court.

3. The decision in the Court of Appeals in the case at bar, as well as those in the First and Sixth Circuits, are contrary to the clear legislative history of the statutory enactments involved; the repeated prior rulings of the Attorney General and the Bureau of Internal Revenue and long established principles in applicable decisions of the Tax Court, the Court of Appeals and this Court that such a 50 per centum addition to tax deficiencies is a civil penalty or administrative fine.

The petitioner's contention herein is that the liability imposed by Section 293(b) of the Internal Revenue Code is a civil penalty or administrative fine which does not survive the death of the taxpayer. This contention is supported by the legislative history of the statute and its predecessors and by kindred statutes.

Section 293(b) is derived from Section 14 of the Act of June 30, 1864, 13 Stat. 223, 226, which became 3176 of the Revised Statutes. That section was amended by the Act

of October 3, 1913, 38 Stat. 114, 179 to apply to violations of the new income tax law. Section 3176 of the Revised Statutes subsequently was succeeded by Section 250(b) of the Revenue Act of 1918 and Section 275(b) of the Revenue Act of 1924 and 293(b) of the present statute, which is involved here.

From their very inception, and until Section 275(b) of the Revenue Act of 1924 was enacted the prior statutes referred to this assessment as a civil penalty and both Houses of Congress so understood it.

Senate Finance Committee Report No. 617 of the Sixty-fifth Congress, Third Session in reporting on the Revenue Act of 1918, p. 18—Title XIII;
House of Representatives Conference Manager's Report to full House, p. 61 (Revenue Act of 1918).

While the word "penalty" was eliminated in enacting Section 275(b) of the Revenue Act of 1924, 43 Stat. 253, 298, the proceedings in both Houses clearly indicated that Congress did not intend to make substantial changes in the law and still regarded this liability imposed by Section 275(b), which except for renumbering is the same as the present 293(b), as a civil penalty.

65 Congressional Record 2429 (Statement by Chairman Green of House Ways and Means Committee to the House);
Senate Hearings, pp. 5, 27, 28 of Senate Finance Committee Hearings on H.R. 6715, 68th Congress.

The opinions of the Attorney General and Bureau of Internal Revenue confirm this view.

17 O.P. Att. Gen. 433, 435;
23 O.P. Att. Gen. 398;
Law Opinions, 926 (I C.B. 241 (1919));
Law Opinions, 1091 (I-1 C.B. 422 (1922));
G. C. M. 9162 (X-1 C.B. 263 (1931));
G. C. M. 15736 (XIV-2 C.B. 325 (1935)).

The Board of Tax Appeals and the Court of Appeals so held in the following cases:

National City Bank of New York, Executor (Estate of Robert Jill) v. *Commissioner of Internal Revenue,* 21 B. T. A. 1080;
Manassa Karger (Estate of Marks Karger) v. *Commissioner of Internal Revenue,* 38 B. T. A. 209 (Appeal dismissed May 15, 1939, C. C. A. 5);
Myrna S. Howell v. *Commissioner of Internal Revenue,* 10 T. C. 859; aff'd 175 F. (2d) 240 (C. C. A. 6);
National City Bank of New York, Executor (Estate of James E. O'Neil) v. *Commissioner of Internal Revenue,* 35 B. T. A. 975, aff'd 98 F. (2d) 93, 2nd Circuit.

Although, as above asserted, there is no direct holding by this Court on these precise questions, statutes of similar import involving the customs of the United States were held to be penalties.

Helwig v. *United States,* 188 U. S. 605;
Passarant v. *United States,* 148 U. S. 424;
Bartlett v. *Kane,* 16 How. 263.

The respondent concedes and the Court of Appeals in the First and Sixth Circuits, the authorities upon which the case at bar was decided, hold that if the nature of the liability imposed by Section 293(b) is as contended by the petitioner, it does not survive the death of the taxpayer.

The respondent contends however, and the Court of Appeals has held that the statutory additions, provided for in the statute for the fraud of the taxpayer, are not penal in character, but are intended to compensate the government for the loss and expense occasioned by the taxpayer's frauds perpetrated upon its revenues; that this concept of liability has its basis in tort and actually represents damages to the respondent for the tort or wrongful act of

the taxpayer and that the damages for such tort under modern principles of law survive the death of the taxpayer (*Kirk* v. *Commissioner,* supra).

These contentions and the decisions of the Courts of Appeals are based upon the decision of this Court in *Helvering* v. *Mitchell,* supra. This case, they hold, has the effect of obliterating all previous rulings and decisions concerning the nature of the statutory liability imposed by Section 293(b).

It is conceded that the *Mitchell* case raised no question as to the survival of the statutory assessment for fraud; that such a holding was not necessary to the decision in that case; and that the question of whether Section 293(b) was a civil penalty was not presented nor argued nor was necessary to the decision therein. It is contended however, and the Court of Appeals has held, that there is implicit in the language of that decision a clear determination that such assessment is not a civil penalty or administrative fine which would abate with the death of the taxpayer.

(a) The petitioner finds no basis for such contention and maintains that the *Mitchell* case supports her position that Section 293(b) assesses a civil penalty or administrative fine which does not survive death.

The language of the opinion describes this assessment as "A Civil Administrative Sanction"; the cases cited by this Court as authority for the conclusions arrived at and especially the following quotation from *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320, are susceptible of no other conclusion:

> "In accord with this settled judicial construction, the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subject, has proceeded on the conception, that it was within the competency of Congress, when legislating as to matters exclusively within its control *to impose appropriate obligations and sanction their enforcement by reasonable money penalties,* giving the

executive officers the power to enforce such penalties without the necessity of invoking judicial power." (Italics ours.)

(b) The *Kirk* and *Reimer* cases in the Court of Appeals, cited above, which were the authorities for the decision here and the *Reimer* case in the Tax Court, 12 T. C. 913, had to face the dilemma that even the most favorable analysis for the respondent of the dicta in the *Mitchell* case failed to supply a legal theory of liability which would survive the death of the party liable. Therefore, these courts created a convenient "tort doctrine" that Section 293(b) imposed upon a taxpayer a liability to compensate the United States for damages due to his wrongful act or tort.

In so doing, they were faced with the further problem that there is no federal survival statute and that under the cases previously decided in the Court of Appeals and in this court a tort liability for injury to property does not survive the death of a tortfeaser unless his estate is enriched thereby.

Schreiber v. *Sharpless,* 110 U. S. 76, 80;
U. S. v. *Daniels,* 6 How. 11, 12;
Patton v. *Brady,* 184 U. S. 608;
Iron Bank v. *Brady,* 154 U. S. 665;
Sullivan v. *Associated Billposters & Distributors,* 6 F. 2d 1000, 2nd Cir.;
Moore v. *Backus,* 78 F. 2d 571, 7th Cir.

This principle in tort law, so long established in this court, was completely abrogated and a new principle was introduced to the effect that no unjust enrichment of the decedent's estate is necessary for the survival of liability. This was done without the benefit of a legislative enactment or decision by this Court; in the face of the previous decisions of this court, above cited, to the contrary and upon reasoning that is subject to the most serious argument as to its soundness.

(c) A much more serious constitutional implication is involved if the decision of the Court of Appeals in this case and the *Kirk* and *Reimer* cases is to be sustained.

If the basis for the liability of the taxpayer's estate, created by Section 293(b), is for indemnity or damage to the respondent for the tort or wrongful act of the taxpayer rather than an administrative fine or penalty imposed against him to sanction the enforcement of the internal revenue laws, then the liability would either be one that existed at common law or in the nature of one at common law and the statute would be unconstitutional as depriving taxpayer's estate of a trial by jury.

U. S. Constitution, Amendment VII;
Labor Board v. *Jones & Laughlin,* 301 U. S. 1, 48.

Therefore, there is presented in the case at bar the following situation:

A court in a limited orbit has construed a federal statute:

1. Contrary to the construction given it by the legislative, executive and judicial branches of the government practically since the inception of the income tax law;

2. Asserting as its authority a case in this court which admittedly did not involve the question herein presented and a close analysis of which indicates that such a question would require a contrary holding;

3. Adopting a tenuous legal theory never before accepted by this court and one which would not only discard previous principles established in this court but would make the statute unconstitutional.

Therefore, it is of primary importance to the government and to the estates of deceased persons that there be a proper understanding of the scope of Section 293(b) of the Internal Revenue Code and that the principles involving the liability therein imposed be clarified by this court.

Wherefore, petitioner requests that the Writ of Certiorari be granted.

ESTATE OF WILLIAM SCADRON, Deceased,
DOROTHY SCADRON, Administratrix,
Petitioner.

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 219—October Term, 1953.

(Argued April 6, 1954 Decided April 27, 1954.)

Docket No. 22949

ESTATE OF WILLIAM SCADRON, Deceased,
DOROTHY SCADRON, Administratrix,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Before:

CHASE, *Chief Judge,* SWAN and FRANK, *Circuit Judges.*

Petition to review a decision of the Tax Court redetermining deficiencies in the income taxes of the deceased taxpayer for the taxable years ended April 30, 1944 and April 30, 1945 and holding that 50% fraud additions assessed under § 293(b) of Title 26, U. S. C. A. were liabilities of the taxpayer which survived his death.

RAPHAEL P. KOENIG,
SAUL L. HARRIS,
Attorneys for Petitioner.

H. BRIAN HOLLAND, Assistant Attorney General, ELLIS N. SLACK, S. DEE HANSON, Special Assistants to the Attorney General, *for Respondent.*

PER CURIAM:

The filing of a fraudulent return by the deceased taxpayer for each of the taxable periods was amply proved and the decision of the Tax Court is affirmed on the authority of *Kirk* v. *Commissioner,* 1 Cir. 179 F. 2d 619, and *Reimer's Estate* v. *Commissioner,* 6 Cir., 180 F. 2d 159.

In both of these decisions what was said in *Helvering* v. *Mitchell,* 303 U. S. 391, to the effect that such additions are but civil administrative sanctions of a remedial character in aid of the assessment and collection of taxes was taken to mean not only that they were not penalties imposed as punishment for crime, which was what was actually decided in the *Mitchell* case, but that, as the language in that opinion indicates, they are not to be considered penal in any sense. We agree though, if we thought the question *res integra,* we might reach a different conclusion.

Affirmed.

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of April, one thousand nine hundred and fifty-four.

Present:

Hon. Harrie B. Chase, *Chief Judge,*
Hon. Thomas W. Swan,
Hon. Jerome N. Frank,
Circuit Judges.

Estate of William Scadron, Dec'd,
Dorothy Scadron, Admnx.,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

Appeal from The Tax Court of the United States.

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

A. Daniel Fusaro,
Clerk.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	3
Conclusion	7

CITATIONS

Cases:

Briden, Estate of v. *Commissioner*, 11 T. C. 1095, affirmed *sub nom. Kirk* v. *Commissioner*, 179 F. 2d 619	3, 4
Helvering v. *Mitchell*, 303 U. S. 391	4, 5, 6
Reimer, Estate of v. *Commissioner*, 12 T. C. 913, affirmed *per curiam*, 180 F. 2d 159	3, 5

Statute:

Internal Revenue Code:	
Sec. 293 (26 U.S.C. 1952 ed., Sec. 293)	2, 6
Sec. 311 (26 U.S.C. 1952 ed., Sec. 311)	6

Miscellaneous:

G.C.M. 22,326, 1940-2 Cum. Bull. 159	5

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 231

ESTATE OF WILLIAM SCADRON, DECEASED, DOROTHY SCADRON, ADMINISTRATRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 68-75) are not officially reported. The *per curiam* opinion of the Court of Appeals (Pet. 13-14) is reported in 212 F. 2d 188.

JURISDICTION

The judgment of the Court of Appeals was entered on April 27, 1954. (Pet. 15.) The petition for a writ of certiorari was filed on July 22, 1954. The

jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether liability for the 50% addition to income tax deficiencies due to fraud, imposed under Section 293(b) of the Internal Revenue Code, survives the death of the taxpayer.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.
>
> * * *
>
> (b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2).
>
> (26 U. S. C. 1952 ed., Sec. 293.)

STATEMENT

Since the petitioner, administratrix of the decedent-taxpayer, does not here—as she did below—raise any question as to the Commissioner's burden of proof with respect to his assertion of fraud with intent to evade tax (Pet. 5), we need state only the Tax Court's primary findings relating to the returns filed by the decedent, and its ultimate finding of fraud (R. 69, 72-73):

The decedent-taxpayer, William Scadron, filed with the local Collector in New York City his individual income tax returns for the fiscal years ended April 30, 1944, and 1945, on the cash basis. The income and victory tax return for the year ended April 30, 1944, and the income tax return for the following year ending April 30, 1945, were each false and fraudulent with intent to evade tax. Part of the deficiencies in income and victory tax for the year ended April 30, 1944, and part of the deficiency in income tax for the year ended April 30, 1945 were due to fraud with intent to evade tax. (R. 72-73.) Scadron died on June 15, 1946 (R. 69).

The Tax Court, sustaining the Commissioner's determination (R. 8-13), held that the decedent-taxpayer's estate is liable for the 50% additions, on account of fraud, to the conceded deficiencies in taxes asserted by the Commissioner for both taxable years, and that such statutory additions for fraud survived the death of the decedent (R. 73-75). The court below affirmed. (Pet. 13-14.)

ARGUMENT

1. The sole question presented is whether the deficiencies for fraud, imposed by Section 293(b) of the Internal Revenue Code, *supra*, p. 2, as additions to the now conceded deficiencies in income taxes, survived the death of the taxpayer-decedent. The affirmative answer given by both courts below accords with the rulings of the First Circuit in *Estate of Briden* v. *Commissioner*, 11 T.C. 1095, affirmed *sub nom. Kirk* v. *Commissioner*, 179 F. 2d 619, and of the Sixth Circuit in *Estate of Reimer* v.

Commissioner, 12 T.C. 913, affirmed *per curiam,* 180 F. 2d 159, involving the identical problem. All of these decisions draw upon the rationale of this Court's opinion in *Helvering* v. *Mitchell,* 303 U. S. 391.

In the *Kirk* case, the First Circuit, following the principle laid down in *Mitchell,* held that the statutory additions imposed for fraud were intended to be remedial rather than punitive in character, and therefore survived the death of the decedent taxpayer and could properly be asserted against and collected from his estate as part of the tax itself. In so holding, the court observed (179 F. 2d at 620) that while Congress has not enacted any specific provisions for survival of liability for the statutory assessment for fraud imposed by Section 293(b), yet neither has it done so with respect to ordinary tax liability. Moreover, it continued (179 F. 2d at 620-621), it saw no reason to adopt the argument that the fraud addition to the tax was intended by Congress as a personal punishment for taxpayers guilty of fraud because this Court, in the *Mitchell* case, had clearly indicated the contrary, specifically characterizing the fraud assessment as not penal but compensatory. The court went on to say (179 F. 2d at 621) that while it was only necessary to the decision of the issues involved in *Mitchell* for this Court to hold that the fraud assessment was not intended by Congress as a *criminal* penalty,[1] yet the Court, in the course of deciding that case, re-

[1] The precise issue in *Mitchell* was whether an acquittal on a charge of income tax evasion barred the subsequent imposition of a 50% fraud assessment.

ferred categorically to "the remedial character of sanctions imposing additions to a tax", and declared, as it had previously made clear in passing on similar legislation, that the addition "was not a penalty at all" but merely a provision designed "primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud"—in short, a remedial device "providing indemnity for loss". See 303 U. S. at 401.

The Sixth Circuit, in the *Estate of Reimer* case, came to the same conclusion for the same reasons. It pointed out, further, that while the Commissioner took the position, as late as 1935, that fraud penalties did not survive the death of a taxpayer and were not collectible from his estate, he reversed his decision in 1940 in apparent reliance upon the rule of the *Mitchell* case.[2]

There is thus full agreement by the Commissioner, the Tax Court, and three circuits that the 50% fraud addition survives the taxpayer's death, and this concert of views rests upon the careful and explicit reasoning of this Court in solving the closely related problem of the *Mitchell* case. There is no conflicting decision. The court below specifically "agreed" with the other circuits and with their interpretation of this Court's opinion (Pet. 14). Its glancing remark—"if we thought the question *res integra,* we might reach a different

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[2] See G.C.M. 22,326, 1940-2 Cum. Bull. 159.

conclusion" (Pet. 14)—does not create or intimate a conflict, but rather demonstrates that the issue has been authoritatively settled by this Court and suggests, at most, a possible disagreement, not with the other courts of appeals, but with the basis of this Court's holding in *Mitchell* which has long been accepted by bench and bar.

2. The *Mitchell* opinion's detailed statement of the grounds for holding that the 50% fraud addition is not a "penalty" (see, especially, 303 U. S. at 399-406) proves, without more, that the decedent-taxpayer's estate is liable for the extra assessment. The Internal Revenue Code treats it in substance and literally as an "addition to the tax in case of deficiency". See Section 293(b). It follows that the fraud assessment, being treated by the statute as in all respects an addition to and therefore part of the tax imposed by Congress, may be assessed and collected from the estate of the decedent just like deficiencies in ordinary taxes of which they are an integral and inseparable part, once fraud has been established or conceded. Congress has expressly provided that these additions to the tax may be asserted against transferees of decedents or of dissolved corporations. Section 311(a)(1) of the Internal Revenue Code. It seems evident that a different result was not intended in this case, even though the liability of an estate of a decedent is not determined in precisely the same way as that of a transferee of a taxpayer's assets. The deceased taxpayer's estate is liable for all the tax liabilities incurred by the decedent for the taxable years in-

volved. This includes not only the liability for the primary taxes but also the added liabilities for interest and for the various other defaults, including fraud, enumerated by Congress in the taxing laws.

CONCLUSION

The decision of the court below is correct, follows the pertinent ruling of this Court, and presents no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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